

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FACCHINA CONSTRUCTION COMPANY, INC.

and

Case 5-CA-29940

CARPENTERS REGIONAL COUNCIL BALTIMORE
AND VICINITY A/W UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA

Thomas J. Murphy, Esq., for the General Counsel.
Michael L. Stevens, Esq. (Arent, Fox, Kintner, Plotkin &
Kahn, PLLC), of Washington, D.C., for the Respondent.
Daniel M. Stanley, Esq. (DeCarlo, Connor & Selvo), of
Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard before me on June 10, 12, 13, 14, and 27 and July 30 and 31, 2002, in Baltimore, Maryland, pursuant to a charge filed on August 31, 2001, by the Carpenters Regional Council Baltimore and Vicinity a/w United Brotherhood of Carpenters and Joiners of America (the Union) against Facchina Construction Company, Inc. (the Respondent). On December 28, 2001, the Acting Regional Director for Region 5 of the National Labor Relations Board (the Board) issued a complaint against the Respondent alleging that it violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On about January 9, 2002, the Respondent filed a responsive answer admitting some of the allegations of the complaint but essentially denying the commission of any unfair labor practices; the Respondent also asserted certain affirmative defenses to the allegations.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs¹ filed by the General Counsel and the Respondent, I make the following findings of fact, conclusions of law, and order.

¹ The Charging Party did not file a separate brief, electing instead to join in the General Counsel's brief.

Findings of Fact

I. Jurisdiction—The Business of the Respondent

5 The Respondent, a Maryland corporation with an office and place of business in La Plata, Maryland, has been engaged as a concrete frame contractor in the construction industry. The Respondent admits that during the preceding 12 months, in conducting its business operations, the Respondent purchased goods valued in excess of \$50,000 directly from points located outside the State of Maryland. Accordingly, I would find and conclude that
10 the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization

15 It is admitted by the parties that the Union, Carpenters Regional Council Baltimore and Vicinity a/w United Brotherhood of Carpenters and Joiners of America has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

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A. Background

25 The Respondent is a concrete contractor. During all times material to the instant litigation, the Respondent was under contract to add two stories to an existing parking garage and build an adjacent parking garage at the Amtrak Station at Baltimore/Washington International Airport (BWI). This project began in approximately November 2000 and ended about a year later in November 2001.² The instant litigation centers on the BWI project.

30 The BWI project's general or prime contractor was Coakley and Williams (C&W). C&W's onsite superintendent was Project Superintendent Larry O'Quinn. The Respondent served as a subcontractor to Coakley and Williams. Gerald Ours, its onsite project superintendent, was responsible for the overall supervision of the project, including the hiring, firing, and laying off of employees.³

35 The Respondent employed around 120 employees at the BWI project during the peak periods of the project's existence. Each employee was assigned to a crew headed by a carpenter (or a laborer) foreman who directed the work of the employees assigned to him.⁴ Carpenter foremen were paid on an hourly basis as opposed to salary and received about \$1 more than the carpenter employees on their crew who were paid at the prevailing rate of \$21
40 per hour. Carpenter foremen, like the crew members, received payment for overtime work.⁵

² All dates, except where specifically noted, are in 2001.

³ Ours is an admitted supervisor and/or agent of the Respondent.

45 ⁴ This litigation concerns only the carpenter foremen and their crews. The laborer foremen and associated crews are not implicated in unfair labor practice allegations and are only mentioned for the sake of clarity.

⁵ The Respondent's carpenter foremen do not have direct authority to hire, transfer, suspend, layoff, recall, promote, discharge, or assign employees (except to various areas of the specific job the crew leader supervises). The Respondent's carpenter foremen cannot directly
50 reward or discipline employees on their crews. Other distinctions and attributes of the carpenter foremen will be discussed later in this decision.

The Respondent required its employees to follow a regular work schedule that began at 7 a.m. and ended at 3:30 p.m., Monday through Friday. On occasion as the need arose, workers were required to report at 6:30 a.m. or earlier, and on Saturdays. However, the Respondent did not mandate that its employees work overtime on the weekdays or on Saturdays. The Respondent did not have an explicit rainy day or inclement weather policy; employees were not required to work on rainy days or in inclement weather if they chose not to.

During March 2001, the Respondent was hiring carpenters for the BWI project and hired four persons, one of whom was a known member of the Union. At the time of hire, each of the four individuals, William Salbeck, Lester Smith, Alfred Keene, and Lynwood Keene, completed application forms and signed a document, "Hiring Policy and Rules of Conduct,"⁶ on his first day of work. The four individuals, all alleged discriminatees, were interviewed and hired by Ours during the period covering March 1 to 14. During the period covering April 11 to 18, the Respondent discharged—laid off—the four.

B. The Substantive Charges

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating job applicants regarding their union membership, union activities, and union clothing; coercing employees by telling them that all the union carpenters had to be laid off; and telling employees they could not pass out union literature. The Respondent is alleged to have violated Section 8(a)(3) and (1) by discharging employees Lester Smith, William Salbeck, Alfred Keene, and Lynwood Keene because of their union support and activities.⁷

C. The interrogation Charges

1. The alleged March 2001 unlawful interrogation by Gerald Ours of Elton Floyd

The General Counsel called Elton Floyd to establish the charge. Floyd testified that he saw newspaper advertisements indicating that the Respondent was hiring around the beginning of March, or perhaps the end of February 2001. Floyd said he and his brother-in-law responded to the ad and were interviewed by Ours at the BWI jobsite.⁸ According to Floyd, Ours provided him and his in-law an application form to be filled out. Ours then asked them whether they were with the Union. Floyd stated that he and his in-law responded that they had never worked for the Union nor did they belong to any union and proceeded to fill out the application. Floyd stated that he and his in-law began working for the Respondent as a laborer the next day and were assigned rigging jacks for the concrete pours.

⁶ See R. Exh. 2.

⁷ The Keenes are brothers. For the sake of clarity and brevity references to each will be by their given names. Lynwood is also known as Lynwood Keene-el.

⁸ Floyd worked for the Respondent for a relatively short period and quit working for the Company because he was unable to make the commute between Washington, D. C. (his place of residence), and the Facchina jobsite. Floyd admitted that he was frequently absent from work because of the difficulties posed by his commute. It should be noted here that Floyd's brother-in-law did not testify at the hearing.

Floyd denied that Ours indicated that if he were a union member, he would not be hired.

2. The alleged March 14, 2001 interrogation by Ours of Salvatore Christopher Astarita

Astarita testified that on about March 14, 2001, he went to the BWI jobsite looking for work; at the time he was wearing a union organizer hat⁹ and a lightweight windbreaker-type jacket emblazoned with union insignia.¹⁰ Upon his arrival at the office trailer, he was directed by the secretary to speak to Ours about hiring opportunities.

According to Astarita, Ours asked him if he had experience working with concrete. Astarita responded that he did and named three concrete contractors for whom he had worked. Ours then asked him if he were a union carpenter. According to Astarita, he told Ours that he was a member and had been a member since 1985, to which Ours asked if the Union were treating him well. Astarita said he was being treated fine by the Union. The conversation ended with Ours telling him the Company was not hiring.

Gerald Ours testified at the hearing and specifically denied making the statements attributed to him by Floyd and Astarita.

3. The April 11, 2001 alleged interrogation by Carpenter Foreman Leon Heavner

The General Counsel called discriminatee Lester Smith to testify about this charge.

Smith stated that he has been a member of the Union for about 5 to 7 years; he has been a journeyman carpenter for around 20 years.

Smith related his brief conversation with carpenter foreman Leon Heavner on April 11. According to Smith, on that day he was wearing his union jacket, a union T-shirt, and his hardhat on which he had affixed union stickers.¹¹ After a time while working in a garage stairwell, Heavner asked him why he was wearing that union stuff. Smith replied that he was a member of the Union, to which Heavner, according to Smith, then asked why was he in the Union.¹² Smith noted that Heavner never told him to or suggested that he take the union paraphernalia off or not wear it.

⁹ See G. C. Exhs. 39 and 40, photos that depict the type of union hat Astarita said he wore on the day in question.

¹⁰ See G. C. Exhs. 42, 43, and 44, photos of the union jacket type Astarita wore to the jobsite.

¹¹ Smith identified the photographs of the type of union clothing he wore on April 11—union organizer T-shirts (G. C. Exhs. 36, 37, and 38), union ball caps (G. C. Exhs. 39 and 40), union windbreaker jacket (G. C. Exhs. 42, 43, and 44), and union stickers (G. C. Exhs. 35).

¹² This was Smith's version of Heavner's conversation, developed on cross-examination. On direct examination, Smith stated that Heavner stopped in the stairwell and he asked about the stickers and colors and what not. "I told him I was in the Union." (Tr. 566.) Smith provided a sworn statement to the Board agent and stated therein that "Leon asked me why I was wearing the union stuff and I told him that I was in the Union." Smith admitted that he did not include Heavner's question, "You sure you're in the Union?" because it was simply part of a conversation that was going back and forth. (Tr. 590-591.)

Heavner, testifying at the hearing, could not recall who Lester Smith was but denied asking him or anyone else about clothing at the BWI jobsite. Heavner said further he did not even notice anyone wearing union T-shirts at BWI.

*D. The Respondent's Allegedly Coercive Statements to Employees¹³
by Carpenter Foreman Mike Spargo*

1. The April 12, 2001 statements

The General Counsel called alleged discriminatee William Salbeck to establish this charge.

Salbeck testified that on April 12, 2001, he reported at about 6:45 a.m. for work and as he was about to go to his work assignment, his crew foreman, Mike Spargo, said that he had to get rid of all the union carpenters because he was bringing workers in from other jobs to take our places. Salbeck said that he merely shook Spargo's hand and said, "See you."

Salbeck said that Spargo did not say that he (and other union carpenters) was being laid off, insisting that Spargo said the union carpenters were being gotten rid of. However, Salbeck noted that Spargo did not say he was being laid off—gotten rid of—because of any particular union activity on his (or the others) part.

2. The April 17, 2001 statements

The General Counsel called Lynwood and Alfred Keene to testify about this matter.

Lynwood Keene testified that on April 17, he and his brother reported to the BWI jobsite at about 6:30 a.m. Lynwood related that he and his brother were wearing union decals on their hardhats, union baseball caps, union T-shirt, and carpenter-type jeans, which he described as their "uniform." Lynwood said that he and his brother began distributing copies of handbills¹⁴ in both English and Spanish exhorting the employees at BWI to join the Union.

Lynwood stated that he and his brother had been distributing the handbills for about 15 to 20 minutes when Spargo arrived on the site and told them they could not distribute the materials. According to Lynwood, Spargo also said at that time that unions were not wanted, that the Respondent was better than the Union, that the Respondent took better care of the

¹³ At the hearing on June 30, 2002, the General Counsel moved to amend the complaint to include an allegedly coercive statement by Heavner to employees on April 12, 2001, to the effect that if they wanted to work, they should stop wearing union decals. (Tr. 809.) He also sought an amendment on July 27, 2002, charging the Respondent, through Mike Spargo around mid-April 2001, with unlawfully coercing employees by telling them they could not bring the Union to Facchina. I did not immediately grant or deny the motions, which are opposed by the Respondent on grounds of prejudice and untimeliness, and reserved judgment on them. I would deny the motions to amend in agreement with the Respondent that the requested amendments would cause prejudice to it on grounds of timeliness. It is my view that the statements should have been disclosed in the investigatory stage of the proceedings and made a part of the charges in the original complaint. However, I, nonetheless, have considered these statements as part of the totality of evidence presented herein.

¹⁴ See G. C. 41, copies of the union handbills that were, according to Lynwood, green or blue. The copy is in black and white.

employees. Spargo also stated that he used to be in the union but quit because he once was laid off for too long a period. Spargo said that since being employed by the Respondent, he had never been laid off.¹⁵

5 Alfred Keene testified about the April 17 incident¹⁶ involving his and his brother's distributions of the handbills. Alfred said that he, his brother Lynwood, and another union members, William Coranado, reported to the jobsite at around 6 a.m.; each man was wearing union apparel—T-shirts and ball caps. Alfred said that the three of them began passing out handbills to employees as they were coming to work until around 6:55 a.m. According to Alfred,
10 Mike Spargo saw them passing out the handbills but did not interfere with them because they were not on the Company's time and were not on the jobsite; they were at the front gate. Alfred explained, however, Spargo had at first instructed them to stop handbilling because, as Spargo put it, BWI was a construction site. However, Coranado told Spargo that the law permitted the distribution because we were not on the jobsite premises and our official workday did not start
15 until 7 a.m. Coranado said that unless Spargo was going to put us on the clock they were engaging in permissible conduct.¹⁷ Alfred stated they thus continued to pass out the literature with no further interference from Spargo.¹⁸

Mike Spargo was called by the Respondent to defend against these charges.

20 Spargo denied ever telling Salbeck that he had to get rid of all the union carpenters and, in fact, stated that he never mentioned the Union on Salbeck's last day of employment.

Regarding the April 17 encounter, Spargo denied that he told any employees outside the front gate at BWI to stop passing out union literature. Spargo admitted that on one occasion on
25 April 12, he told Lynwood to stop passing out union literature because it was after 7 a.m. and the scheduled safety meeting had commenced. However, he denied putting the brothers on the clock on the day to stop them from passing out literature or because unions were not wanted at Facchina. Spargo also denied telling Lynwood or anyone else that Facchina was better than
30 the Union, or that the Company was not looking to be union.¹⁹

¹⁵ Lynwood also said that Spargo, while complimenting his work (he had no complaints about it), told him if he wanted a future (with the Respondent), he had to stop trying to bring the Union to Facchina, including talking to the other employees about the advantages associated
35 with the Union, or just knowledge of the Union.

¹⁶ Alfred originally stated that he and his brother passed out the handbills on April 16, but it is clear that he meant April 17 because of other events involving him and his brother at the jobsite that actually occurred on April 16. These other events will be discussed later in this decision.

40 ¹⁷ Alfred related that he passed out similar handbills on April 11 at about 6 to 6:30 a.m., just before a scheduled safety meeting in the garage area. On that date, Alfred said that Spargo put him and his brother "on the clock," so they ceased handing out the handbills. Lynwood corroborated that part of his brother's testimony except he did not say that Spargo put them on the clock but told them to stop handbilling at about 6:45 a.m., 15 minutes before the safety
45 meeting was to start and their official workday began. Lynwood also testified that later he asked Heavner why they could not handbill prior to 7 a.m. and was told that "the Union was not wanted there [at Facchina], that if you want to work [at Facchina], there was no problem with our work, just stop wearing the union decals and things of that nature—it's a conflict of interest." (Tr. 616.)

¹⁸ Coranado testified at the hearing, but his involvement in the April 17 handbilling matter
50 was not explored by the parties.

¹⁹ Spargo also denied telling Lynwood or other employees to stop wearing union clothing
Continued

E. The Supervisory and/or Agency Status of the Respondent's Crew Foremen

As a preliminary matter, the Respondent first defends against the 8(a)(1) allegations by contending that Carpenter foremen Mike Spargo and Heavner (or any other of its crew foremen) are not supervisors and/or agents within the meaning of Section 2(11) and (13) of the Act; that, arguendo, any statements they may have made cannot therefore be imputed to the Respondent.

As I have previously determined, in agreement with the Respondent, it is clear on the record that its crew foremen did not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline members of their crew—traditional and customary supervisory powers. The Respondent also argues that while the foremen direct the work of the crew, they do so only based on the project plans and blueprints prepared by the company architect and on Ours' specific instruction and direction. The Respondent admits that foremen completed timesheets but that they merely took information from timecards and entered them on the sheets—a clerical function. Furthermore, the Respondent submits that while foremen could order several small items like nails and lumber, they could not buy supplies for the Company. The Respondent also points out that foremen were hourly as opposed to salaried workers, making only \$1 more than the crew members, and received no paid vacation or bonuses as did truly supervisory employees. On balance, the Respondent submits that its foremen did not exercise sufficient independent judgment to qualify as supervisors under the Act.

As to the agency issue, the Respondent argues that the foremen's wearing of white hats, having radios, and performing as they did on the BWI project does not translate into "agency" within the meaning of the Act.²⁰

Section 2(3) of the Act defines "employee," and specifically excludes from that term "any individual employed as a supervisor." Under Section 2(11) of the Act,

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board has held that these functions are in the disjunctive and the indicia specified in Section 2(11) are sufficient to confer supervisory status on an individual if the statutory authority is exercised with independent judgment and not in a routine manner. *American Commercial Barge Line Co.*, 337 NLRB No. 168 (2002); *Allen Services Co.*, 314 NLRB 1060 (1994). See, e.g., *Health Care & Retirement Corp.*, 328 NLRB 1056 (1999); and *John N. Hansen Co.*, 293 NLRB 63, 64 (1989).

because of any conflict of interest or that the Keenes should stop trying to bring in the Union if they wanted a future with the Company.

²⁰ Actually, the Respondent did not argue very strenuously or much at all on the agency issue. I have attempted to state their position based on my gleanings from the Respondent's argument against a finding of supervisory status for the foremen.

The Supreme Court in *NLRB V. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994), established the test for determining whether an employee can be deemed a supervisor under Section 2(11) of the Act.

- 5 First, does the employee have authority to engage in 1 of the 12 listed activities?
 Second, does the exercise of that authority require "the use of independent judgment?"
 Third, does the employee hold the authority in the "interest of the employer?"

10 These questions must each be answered in the affirmative for an employee to be found a statutory supervisor.

Regarding statutory agency, the Board applies common law principles of agency to determine whether an individual possesses actual or apparent authority to act for an employer, and the burden of proving an agency relationship is on the party who asserts its existence. See, 15 e.g., *Pan-Oston Co.*, 336 NLRB No. 23, slip op. at 1-2 (2001). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, employees would reasonably believe that the alleged agent was reflecting company policy and 20 speaking and acting for management. See, e.g., *Pan-Oston Co.*, supra, citing *Waterbed World*, 286 NLRB 425, 426-427 (1987), enfd. mem. sub. nom. 974 F.2d 1329 (1st Cir. 1992).²¹

The General Counsel submits that each of the Respondent's crew foremen, by their testimony at the hearing,²² admitted to performing the following functions as part of their regular 25 duties and responsibilities: (1) verification of timesheets for their crew members' work; (2) delegation and reviewing of crew members' work; (3) moving crew members around the jobsite to complete the project in timely fashion; (4) handling day-to-day (crew member) grievances; (5) recruiting employees to work overtime; policing the project site; (6) allowing employees to leave early and putting them "on the clock." Accordingly, he contends that these functions establish 30 that crew foremen functioned as a statutory supervisor in the Respondent's operations.

The General Counsel also argues that the Respondent also held out the crew foremen act as statutory agents. He submits that the record discloses that all crew foremen wore white hardhats as opposed to the green ones provided for the crew workers. Foremen also were 35 provided radios and keys to the gang boxes where crew members' tools were kept. He also points out that foremen also were given clear agency roles by the Respondent, including prohibiting literature distribution, distributing paychecks, informing employees of their layoff or termination, and advising management of problems with employees.

40 I would find and conclude that the Respondent's crew foremen are statutory supervisors and in the alternative statutory agents. First, while the General Counsel's recitation of the functions of the foremen is accurate, I am not altogether convinced of the amount of independent judgment the Respondent's foremen possessed in performing many of their functions, many of which seem more in the way of clerical and routine functions.

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²¹ These principles and authorities are taken from *Ready Mix, Inc.*, 337 NLRB No. 181 (2002).

50 ²² The foremen who testified at trial are Mike Spargo, Marshall Jenkins, Heavner, and Ben Spargo.

However, it is very clear, and the General Counsel's argument illustrates this point, that the crew foreman possesses the authority to responsibly direct his crew members in the performance of their job assignment and that his independent judgment is heavily employed in directing the crew members.

Notably, carpenter foremen Mike Spargo and Heavner were highly experienced carpenters with demonstrated and recognized leadership skills. The Respondent entrusted these men with managing and deploying a crew in vital assignments at the BWI project. Heavner and Spargo (and other foremen) independently assigned crew members to assignments and evaluated the crew members' abilities and competencies in making work assignments. Foremen like Heavner and Spargo also were entrusted by the Respondent with making sure the work was done properly, and in exercise of that trust, Spargo, for instance, testified he would order "redo's" of work and would require work to be done in a certain way. In this exercise of this authority, the foreman's independent judgment was called into play. Admittedly, Spargo and Heavner were provided the plans for the job at hand and reported to the project supervisor regarding their needs to finish the job. However, once given their marching orders, as it were, these foremen utilized their skills and experience independent of management and directed their crew members in the performance of job assignments. This, to me, is the type of independent judgment exercised in a nonroutine manner associated with the responsible direction of employees within the meaning of Section 2(11).

In the alternative, the foreman's agency status, in my view, is beyond cavil established on the record. Clearly, based on Heavner's and Spargo's statements and the credible evidence of the employees working on the BWI site, it is abundantly clear that crew foremen were reflecting company policy and openly and acting for management.²³ I would find and so conclude.

Having determined that the Respondent's crew foremen, specifically and most certainly Mike Spargo and Leon Heavner, are statutory supervisors and in the alternative statutory agents, I turn to the substantive charges alleging violations of Section 8(a)(1).

It will be helpful first to discuss applicable legal principles.

Section 7 of the Act (in pertinent part) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." U.S.C. §157. Thus, employees have the right to, inter alia, support or oppose union representation.

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct, which it

²³ So that the basis for my finding of agency is clear, the undisputed evidence discloses that, among other things, the Respondent's crew foremen are issued white hardhats, radios, and keys to employer property, perform many clerical functions routinely, relay instructions from or on behalf of management to employees, and report problems or other personal related issues to management. These functions and duties of the Respondent's carpenter foremen are surely emblematic of agency within the meaning of Sec. 2(13).

may be reasonably said, tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); and *American Freightways Co.*, 124 NLRB 146, 147 (1959). Thus, it is violative of the Act for the employer or its supervisors and agents to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995).

The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 1176 (1984), enf. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context of statements can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466 (2000).

In the interest of maintaining production and workplace discipline, employers can lawfully impose restrictions on workplace communications among employees and, in fact, when justified by such factors or considerations, employers can prohibit all talking while employees are working. *Stone & Webster Engineering Corp.*, 220 NLRB 905 (1975); *Pilot Freight Carriers, Inc.*, 265 NLRB 129, 133 (1982).

However, no-solicitation rules or policies are unlawful if they unduly restrict the organizational activities of employees during periods and in places where these activities do not interfere with the employer's operations. *Our Way, Inc.*, 268 NLRB 394 (1983); *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994), cited in *Adtranz, ABB Daimler-Benz*, 331 NLRB 291 (2000). Therefore, a prohibition on communication among employees cannot be overly broad, so broad that it prohibits communication among employees during paid nonwork periods such as breaks and lunchbreaks or during the unpaid nonwork periods such as before or after work, so long as the employees are lawfully on the employer's premises. Such broad prohibitions are presumptively invalid. *St. John's Hospital*, 222 NLRB 1150 (1976). Said another way, employers may lawfully ban worktime solicitations when defined as not to include before or after regular working hours, lunchbreaks, and rest periods. *Sunland Construction Co.*, 309 NLRB 1224, 1238 (1992). However, without violating the Act, employers may remind employees of existing rules or established policies regarding solicitation. *Bryant & Stratton Business Institute v. NLRB*, 140 F.3d 169 (2nd Cir. 1998).

Regarding employer interrogations of employees, it is well established that interrogation of employees is not per se illegal. The Board has held that the test of the illegality of interrogation is whether, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their rights. *Rossmore House*, supra.

Factors to be considered about questioning of an employee include time, place, personnel involved, and information sought. *Blue Flash Express, Inc.*, 109 NLRB 591 (1954); *American Freightways Co.*, supra; and *NLRB v. Illinois Tools Works*, 153 F.2d 811 (7th Cir. 1946).

Notably, also, the Board has considered even arguably brief, casual, and not followed up questioning violative of the Act if the words and context contain elements of coercion and interference. *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000). In *Sea Breeze Health Care Center*, the Board underscored its decision by citing the observation of the Fifth Circuit in *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342 fn. 7 (1980):

[A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicions about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude, and profane does not alter the case. [Quoting from the underlying decision in *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 172 (1979).]

Finally, Section 8(c) provides that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. [29 U.S.C. §158(c).]

The Board has noted that Congress added Section 8(c) to the Act in 1947 as part of the Taft-Hartley Act, because it believed that the Board has made it "excessively difficult for employers to engage in any form or noncoercive communications with employees regarding the merits of unionization."

F. Discussion and Conclusions of the 8(a)(1) Allegations

Any discussion of the 8(a)(1) charges must begin with the query: Did the management employees make the alleged offending statements? If so then, were the statements of the type that can be reasonably said to interfere with the employees' Section 7 rights.

Turning to the alleged interrogations of Floyd and Astarita, I would credit both men's testimony regarding their encounter with Ours. I note that Floyd impressed me as being especially candid, and he was a laborer, not a carpenter. In a sense then, he was somewhat disinterested in this matter. Floyd was hired by Ours but admitted that he was not a very reliable worker for the Respondent because of the commuting distance he had to travel. He thus was candid and bore no ill will toward the Respondent. He simply appeared to be testifying truthfully at the hearing.

Astarita, though an obvious unionist at the time, in likewise appeared to be truthful about his encounter with Ours, which was very similar to Floyd's. Thus, Ours' line of questions takes on a certain pattern. In effect then, Floyd is corroborated by Astarita and vice versa. Ours, for his part, simply denied making the statements. Under the circumstances—essentially two applicants for hire at around the same time, stating under oath that they were asked about their union affiliation—Ours' simple denial is not sufficient or persuasive.

The Respondent argues that even if Ours made the statements (queries) attributed to him, there was no violation of the Act. The Respondent essentially argues that Ours' questions had no effect on his hiring decisions. As I have noted, neither an employer's motive or success or failure in making the statements is determinative of an 8(a)(1) violation.

Accordingly, I am in agreement with the General Counsel that the Respondent, through Ours, violated the Act by questioning the two job applicants about their union affiliation or membership, and how the Union was treating them was unlawfully coercive and supports here a finding of a violation of the Act. I would so find and conclude.

Turning to Smith's alleged conversation with Heavner, I note that this conversation was of the one-on-one type. The General Counsel argues that Smith's version of the conversation in the stairwell should be credited because he testified in a concise and forthright manner. He further submits that Heavner's statements to Smith were not innocuous or casual, especially when considered with the Respondent's subsequent termination of Smith and the other alleged discriminatees. Thus, the General Counsel contends that Heavner's questioning of Smith was part and parcel of the totality of its unlawful conduct in this case and, under these circumstances, constitutes a violation of Section 8(a)(1).

The Respondent argues that Smith's testimony about the encounter with Heavner vacillated between whether Smith volunteered to Heavner that he was in the Union or Heavner asked him about his union affiliation. Therefore, Smith's testimony is not reliable and should not be credited. The Respondent notes that Heavner credibly denied asking Smith anything about his union clothing and did not even notice Smith's (or anyone else's) attire. The Respondent also contends that even if Heavner did question Smith that under the circumstances—Smith's open and active support for the Union clearly obvious by wearing of his clothing and conversation—such questioning was not unlawful.

Smith impressed me as a strong, accurate, and confident witness. He answered all questions posed to him without hesitation or evasion; he seemed very candid. I would find and conclude that his version of the encounter with Heavner is the more credible. I also note that the type of clothing Smith had on, stickers and emblems with growling bulldogs and festooned with union logos, in my view, would be hard to miss or not notice. I found Heavner's testimony that he did not notice Smith or anyone wearing this type of garb on the jobsite not convincing, to say the least. However, while I would find that Heavner's questions and statements attributed to him by Smith were indeed made, I do not think the questioning was violative of the Act. Under the totality of the circumstances, including Smith being an active union supporter who, by his clothes and responses to Heavner, openly declared his union ties, Heavner's questions and statements were not coercive and could not be reasonably said to interfere with Smith's Section 7 rights. I would recommend dismissal of this aspect of the complaint.

Directing myself to the statement Mike Spargo allegedly made to Salbeck, here again witness credibility must be addressed as a threshold issue. Spargo denied making the statement. Salbeck insisted that he did and produced a journal of his daily activities, which he maintained at the project. The journal contains an entry for April 12, which states (in Salbeck's handwriting):

Layoff—all union carpenters—so they can bring steady workers from other jobs to take our place & were not hiring any new carpenters²⁴

Notably, as will be seen later herein, the Respondent contends that the layoff of the four alleged discriminatees was predicated in significant part on its needs to bring in its more senior workers from another jobsite.

I would credit Salbeck's testimony that Spargo made the statement in question. Contrary to the Respondent, I do not view Salbeck's insouciant response to be significant for purposes of weighing his credibility nor for its legal effect.

²⁴ Salbeck's journal is contained in G.C. Exh. 58. In another part of the journal Salbeck wrote "4/12 Layoff, all union carpenters, so they can bring steady workers from other jobs, not hiring any new carpenters."

The main issue then is whether this statement is reasonably coercive given the circumstances viewed in their totality.

5 The Respondent contends that even if Spargo made the statement it was not coercive. The Respondent submits, in essence, that the statement reflects a statements of fact—that only Salbeck's union friends were being laid off to make room for a more serious crew of the Respondent's workers.²⁵

10 The General Counsel essentially argues that Spargo's statements can reasonably be said to impede or discourage union involvement as evidenced by the clear nexus between the offending statements and the discharge of Salbeck and the other three union carpenters.

15 Undoubtedly, Spargo's statement at bottom is a discharge notice and, under normal circumstances, an employer's telling a worker that he is being laid off in favor of more senior employees in the employer's operation, in my view, would not be actionable under the Act. However, here Spargo told Salbeck that he had to lay off—get rid of the—union carpenters. The issue becomes whether this statement in context reasonably may be said to have interfered with Salbeck's and others employees' rights under the Act.

20 I would answer this question in the affirmative. Notably, by telling Salbeck that only the union carpenters had to make room for the senior crew, Spargo (it could reasonably be said or interpreted) implied that other nonunion employees, perhaps those with even less seniority than Salbeck and the others, would be spared a layoff simply because they were not union
25 carpenters or other tradesmen. The Respondent's other employees could then reasonably surmise that it is not in their best interest to belong to a union at the Respondent's business since union carpenters alone were subject to layoff when senior crews need work. Thus, by telling Salbeck that the union carpenters had to be let go, the Respondent, in my view, unlawfully interfered with his and other employees' rights—to form, join, or assist a labor
30 organization—and in context also unlawfully coerced them under the Act. I would find a violation of the Act.

35 Regarding the April 17 incident, I would credit the testimony of the Keene brothers. Both Alfred and Lynwood testified confidently and calmly essentially that Mike Spargo told them to stop distributing the handbills during a nonwork time and place (off premises) when and where the law clearly permits the distribution of union materials. I recognize that Alfred's and Lynwood's testimony is not entirely consistent. For instance, Lynwood did not mention Coranado's intervention and explication of the law to Spargo. However, their testimony in material aspects was very consistent, mainly in that Spargo, at some point, impermissibly
40 interfered with their lawful distribution of the handbills. Spargo's flat denial in the face of two credible assertions about the incident and his conduct is simply not persuasive. I would find and conclude that the Respondent violated Section 8(a)(1) of the Act by telling employees Alfred and Lynwood Keene to stop distributing union literature when they were not on working time and were not on company property.

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50 ²⁵ The Respondent submits that as a matter of fact not all union carpenters were laid off at BWI; namely, union workers Charlotte Alford, Bobby Blue, and Killer Robinson remained on the job.

G. The 8(a)(3) Unfair Labor Practices Allegations

The complaint essentially alleges that Salbeck, Smith, and Alfred and Lynwood Keene were terminated/discharged by the Respondent because of their activities in support and on behalf of the Union.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization. 29 U.S.C. §158(a)(3).

Preliminary to determining whether an employer has discriminated against an employee in violation of Section 8(a)(3) or 8(a)(1) of the Act, the Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected activity or activities of the employee was a motivating factor in the employer's decision affecting any term or condition of the employees' employment. If this is established, the burden then shifts to the employer to demonstrate that the action would have occurred irrespective of whether the employee was engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981).

It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the totality of circumstances. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Joseph Stallone Electrical Contractors*, 337 NLRB No. 178 (2002), and *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enf'g. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); and *In-Terminal Service Corp.*, 309 NLRB 23 (1992).

Once the General Counsel has made a prima facie case, the burden shifts back to the employer. That burden requires a respondent "to establish its *Wright Line* defense only by a preponderance of evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

Directing myself to the instant charges, as a preliminary matter, it may fairly and accurately be stated, and the Respondent concedes, that the Respondent's project manager, Ours, hired all four of the alleged discriminatees and knew or came to know ultimately they were affiliated with the Union at or near the time of their respective hires. Additionally, there is no real dispute that the actual decision to discharge the four was made by Ours, who employed his foreman, Mike Spargo, to deliver the notice on or about the dates set out in the complaint; that

is, on or about April 12, 2001, for Smith and Salbeck and on April 18, 2001, for the Keene brothers.

Thus, the central issues for resolution of the 8(a)(3) charges relate to the Respondent's knowledge of the union activities of the four and the purported reasons for their discharge.²⁶

Regarding the Respondent's knowledge of union activity, I have previously discussed in the context of the 8(a)(1) allegations that Mike Spargo knew that the Keenes were unionists and, in fact, admitted that on April 12 he forbade their distributing union literature as a company safety meeting was about to commence. The Respondent, while arguing strenuously against Spargo's supervisory status, nonetheless, concedes that Spargo routinely reported to Ours about matters of importance. I believe that Spargo, in all likelihood, reported the Keenes' activities to him.²⁷ Contrary to the Respondent, I would find and conclude that the Respondent knew of the Keenes' union activities directly through the observation of its supervisor (agent) Mike Spargo who, in my view not only communicated the Keenes' attempted distribution to Ours but, in all likelihood, identified them as the distributors.

Regarding Smith, he said that he did not distribute literature,²⁸ but, in my view, his support for the Union was also communicated to the Respondent. My reasons are as follows: First, Smith wore union "colors" to work in a prominent display of his support for the labor organization around the time the Keenes attempted to pass out the handbills, around April 11. Smith also credibly testified about his conversation with Foreman Heavner—a person I have concluded is a statutory agent/supervisor—and told him he was in the Union in response to Heavner's query about the stickers and colors. In my view, Smith's showing of the colors was "union activity" communicated directly to one of the Respondent's supervisors. Because the Respondent's foremen report to Ours, I would infer that Heavner, in all likelihood, communicated Smith's open display of his support for the Union to Ours. I note also that Smith was discharged by Ours exactly 1 day later after his reported encounter with Heavner.

As to Salbeck's union activities, it is clear from the beginning of his time with the Respondent that he was not only a union member but also an activist. Ours confirms this by admitting that he assumed the Keenes and Smith were union members because Salbeck

²⁶ In agreement with the General Counsel, I would find and conclude that the Respondent's animus against the Union has been plainly established by dint of the 8(a)(1) violations previously established herein. However, I would find as additional indicia of the Respondent's animus against the union statements made by the Respondent's crew foremen, Heavner and Mike Spargo, to Lynwood Keene as follows: (1) Lynwood Keene credibly testified that Heavner told him on April 12 that the Union was not wanted at the Respondent and if he wanted to work there, there was no problem with his work but just stop wearing the union decals and things of that nature—it's a conflict of interest. (Tr. 617.) (2) Lynwood also credibly testified that on April 17, Spargo said he had no problem with his work but, if Lynwood wanted a future at Facchina, he had to stop trying to bring the Union in, including talking to their employees about the advantages of the Union and knowledge of the Union. (Tr. 625.)

²⁷ The Respondent, however, contends that Spargo did not identify to Ours by name the employees who were distributing. Ours admitted that Spargo informed him that he had asked workers not to hand out literature to people who were working; that Spargo felt the distributors were disrupting his work crew. (Tr. 23.) I do not find it credible that Spargo did not identify the Keenes as the workers in question.

²⁸ Interestingly, Lynwood Keene said that Smith distributed handbills but that he did not think Ours observed him.

referred them for hire. Ours also admitted that after the four were hired, he recalled seeing each wearing union T-shirts now and then. Ours claimed that he, however, did not witness Salbeck, or the Keenes or Smith for that matter, engaging in specific union activities. Nonetheless, in spite of this denial, I would conclude that Ours had good reason to believe that Salbeck was part of the Union's organizing activity if for no other reason than Salbeck was first hired and introduced the other union activists to the BWI project.²⁹

Based on the foregoing, I would find and conclude that the General Counsel has met his initial burden under *Wright Line* regarding the four alleged discriminatees.

The Respondent principally contends that the Respondent's decision to terminate the four union carpenters had nothing to do with their wearing union paraphernalia or distributing union literature. Rather, the Respondent asserts the four were terminated (along with several other under-performing employees) because of the availability of a better performing crew of its more senior employees. The Respondent called Ours to explain his decision to terminate the four.

Ours testified that he had no concern for or about the Union's organizing efforts at Facchina because the BWI project was a prevailing wage job, which called for a higher pay scale than the union carpenters received. Regarding the four alleged discriminatees, Ours maintained that Smith, Salbeck, and the Keenes were terminated because of poor performance, poor attendance, and because the Company was faced with possibly having to lay off one of its senior crews working at another project which was ending. According to Ours, he decided to take advantage of this situation, killing two birds with one stone as it were, by getting rid of the poorly performing workers and keeping the good ones.³⁰ Ours noted that the four alleged discriminatees were not the only poor performers let go around the time of the questioned discharges. He cited as examples five other, as far as he knew, nonunion affiliated employees who were let go around the same time for similar reasons—poor performance, no-show, and lack of work.³¹

²⁹ The Respondent called as one of its witnesses David Richard Roday, who was assigned to Ben Spargo's crew with Smith. Ben is Mike's son. Roday, clearly not a union supporter, testified that Smith and three guys came to work on about April 11 wearing the same union colors and let everyone know they were passing out union literature. I would presume that at least two of the three guys were the Keenes; Salbeck said he never wore union paraphernalia and did not distribute union literature. Roday said that Smith spoke to him about the Union several times, but Roday did not mention this to Ben Spargo or Ours until after Smith was let go. However, irrespective of whether Roday told anyone, it seems clear that at least as of April 11, three of the four alleged discriminatees had made their support for the Union such an open matter at the BWI project that I cannot believe Ours, as project manager, did not know of their activities by his own observation or through reports made by his foremen to him.

It is also noteworthy that the Respondent, in its brief, characterizes the four alleged discriminatees as "salts" for the Union's organizing effort at the BWI project, "who pushed the envelope" in a scheme to file charges against Facchina. However, somewhat incongruously, the Respondent asserts that the union activities of the four were unknown to Ours.

³⁰ This group of workers is referred to as the Clarendon crew, which reported to the BWI jobsite around April 16, 2001. (See R. Exh. 17.) Ours noted that not all the workers assigned to that crew reported on April 16 to BWI because some members were finishing up at the Clarendon site.

³¹ Ours identified the employees as Elton Floyd, discharged on April 12, 2001, for no-show/no-call (R. Exh. 11); Joshua Porter, discharged on April 13, 2001, for no-show/no-call (R.

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Ours also asserted that he knew of other union affiliated employees working at BWI who were not laid off.³² Ours, however, admitted that these employees never, to his knowledge, engaged in any organizing activities at the site.

Ours stated he felt that the four discriminatees were either poor performers or had such poor attendance that they were justifiably laid off. According to Ours, Smith missed work on March 30 and 31 and April 5 and 7. Salbeck missed March 13, 21, 29, 30, and 31 and April 3 and 7. Alfred Keene missed March 23, 24, 30, and 31 and April 4, 7, 9, and 13. Lynwood Keene missed March 23, 24, 30, and 31 and April 7, 9, and 13.³³ According to Ours, the Company does not have a written excused absence policy but, nonetheless, expects its employees to show up every day in order to keep the project on schedule and be productive. The four alleged discriminatees, in his mind, missed too many days for the short period they were employed at Facchina.

Regarding the job performance of the four, Ours stated that he constantly received complaints about each man's work, that their individual performance did not measure up to the standards of other carpenters on the project. Also, the four, in addition to missing an inordinate number of days, also arrived late for and left work early. Ours conceded that the problems of the four were never documented and that he never informed them of their attendance and performance issues.

Ours also noted that while he made the decision to discharge the four, he did not personally deliver the news to them. Spargo was given this duty and, to his knowledge, Spargo did not mention that the four union carpenters were being let go because of poor performance or attendance. Rather, the four were told that the Clarendon crew was coming on board to replace them. Ours explained that Facchina, as a matter of policy, tries to avoid confrontations with employees and, therefore, does not tell them they are being let go for attendance or performance problems. Ours said, consistent with this policy, the company paperwork—the status/payroll change report—may not reflect the (true) actual reasons for a job action which may harm an employee's future job prospects.³⁴ Thus, the discharge paperwork for the four, he admitted, does not indicate that they were poor performers.³⁵ Ours explained that where the forms indicate lack of work as a reason for discharge of Salbeck and Smith, this referred to a companywide lack of work because carpenter work was still available at BWI at the time of the layoff.

Exh. 12); Timothy Butler, discharged on April 12, 2001, for no-show/lack of work (R. Exh. 13); Alvarado Yahalmo, dismissed April 18, 2001, for poor performance/lack of work (R. Exh. 16); and Bernado Herrera, discharged on April 18, 2001, for no-show/no call (R. Exh. 15).

³² Ours identified the other union employees as Charlotte Alford, Bobby Brown, and Charles Robinson.

³³ The Keenes rode together to work, having only a single means of transportation to the job between them, as their missed days coincided.

³⁴ The status/payroll forms for the Keenes indicate they were dismissed for no-show/no-call; Salbeck and Smith were dismissed for lack of work/no-show.

³⁵ I note that the discharge form for Alvarado Yahalma (R. Exh. 14) indicates that he was dismissed for poor performance and also lack of work. See G. C. 22, the discharge of Chad Glennon who was discharged for attitude, attendance, and failure to wear proper safety equipment. These can be fairly said to be rather disparaging remarks about an employee in my view.

Mike Spargo testified about his role in the decision to terminate the four.

Spargo stated first that with regard to employee related issues, he would discuss these only with Ours. Most of his complaints about workers centered on absenteeism,³⁶ workers' not calling in if unavailable for work, working slowly or not diligently working, and poor work quality.

Spargo said that he complained to Ours about the four—Alfred Keene about inadequate work; Salbeck's work had to be redone and he did not follow his instructions on the grommet work; Smith, like Salbeck, did not seem to want to do the assigned work in a quality way. Spargo admitted that he assigned Smith to Ben Spargo's crew after about a week on his (Mike's) crew, to help Ben with stairway building. Spargo stated that Lynwood, like Salbeck, was also a slow worker and poor performer.

Spargo also related problems he experienced with Salbeck's, Smith's, and the Keenes' absenteeism, by which he meant not coming to work when scheduled, without calling in or telling him in advance. Salbeck and Smith, in particular, according to Spargo, had attendance problems early on in their employment, leading Spargo to conclude that they were not possessed of a good work ethic. Spargo stated that he complained to Ours about Salbeck's attendance problems two to three times and Smith's only once because he assigned Smith to Ben Spargo's crew. Therefore, he no longer had to deal with him.³⁷ Mike Spargo also complained to Ours about Alfred Keene's attendance two or three times and recalled that Alfred was hired one day and, the very next day, came in at 10 a.m. Lynwood's attendance issues were similar. In the first week of his employment, Spargo stated of particular concern to him was the Keenes' arriving late and leaving early. According to Spargo, those problems escalated after the first week. Spargo said he made his complaints to Ours and resignedly told him that he (Ours) should do what he wanted to, there was nothing that he (Spargo) could do.

Spargo acknowledged that he gave the four their final checks and told each that another crew—Mackie Jenkins' Clarendon crew—had been transferred to BWI and they were being replaced. According to Spargo, he merely repeated what Ours had told him. He did not know personally whether the four were being let go for poor performance, but he thought that their performance and attendance as well were a part of the decision based on his having made complaints of this nature against them. Spargo admitted that Ours did not tell him to discharge the four for performance and attendance issues.

The General Counsel called the four discriminatees to rebut the Respondent's defense.

Salbeck stated that by his second day at the Company, Mike Spargo told him he was doing a good job reshoring the concrete decks and, in fact, never asked him to redo anything he had worked on. Salbeck admitted that he asked Spargo for time off, particularly on April 29 and 30 when his girlfriend was expecting the birth of their child. According to Salbeck, Spargo approved his request and told him to take as much time as he needed.³⁸ Salbeck stated that

³⁶ Spargo stated he, however, did not know what Facchina's actual absentee policy was; he merely reported to Ours if he had a complaint of this type or others over which he had no real control or authority to remedy.

³⁷ Spargo said that the stairways were behind schedule and Ben needed help. I note that if Spargo is to be believed, he sent Smith, a poor performer, to help with a troubled part of the project. Similarly, although Spargo considered Salbeck a poor worker, he offered him Saturday overtime work. Spargo testified that a poor worker is better than none at all.

³⁸ Spargo denied commenting favorably on Salbeck's work. Spargo did recall conversing

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contrary to the Respondent's records, his personal diary (G.C. Exh. 58) indicated that he worked on March 13 and April 3.³⁹

Salbeck said that he was asked to work on Saturdays by Spargo and did work on a couple of Saturdays. However, Salbeck said that Saturday was not a required workday. Salbeck also said that he was not told that he had to call in on a rainy day and, in fact, did not report to the project on rainy days.⁴⁰ Salbeck said he was never told by Facchina's management he had to show up on rainy days.

Smith insisted that he had made it clear to management from the inception that he could not work Saturdays because he was taking project superintendent classes given by the Union on that day.⁴¹ In any case, Smith stated that he understood that Saturday was a nonmandatory workday, strictly voluntary for workers wanting overtime work. Salbeck stated that he did not work on Saturday, March 31.

Smith stated that he inquired of the company secretary about the Company's rainy day policy and he was told that if it were raining hard, not to come in. However, if a worker decided to come in on the chance the rain would stop, he could come in and make 2 hours' show-up pay.⁴² Smith stated he did not work on March 30 because it was raining, although he did show up for work. Smith said he decided not to work but took the 2 hours' show-up time.⁴³ Smith acknowledged that some of Mike Spargo's employees worked when it was raining but these workers were often merely tearing down forms, not building forms as would a carpenter at BWI.

Smith said that he also did not report for work on April 5 because the supervisor's examination was given that day. According to Smith, he spoke to Ours the day before and advised him that he would need the entire day to study and then take the test.

Smith stated that generally if he was not coming in, he would call in; however, while working at Facchina, he did not call in; rather he would speak to Ours directly the day before and then let Ben Spargo know of his plans and conversation with Ours.

Smith said that at the time he was informed of his layoff by Spargo, his performance and attendance were not given as reasons; rather, the seniority of other workers was the stated

with Salbeck about a miscarriage and trouble with his first wife, but that Salbeck did not ask for time off.

³⁹ Salbeck admitted that in his affidavit to the Board pursuant to the investigation, he said he did not work on March 13 and April 3. However, his pay records (not provided at the hearing) indicate he was paid on these days.

⁴⁰ Salbeck said he was never given an inclement weather telephone number to call. Salbeck stated that he did not come to work on March 21. Notably March 21, 2001, was a rainy day according to climatic reports in evidence. See G.C. Exh. 13.

⁴¹ Smith believed he never worked on Saturdays. His schedule of classes that he identified at the hearing (G.C. Exh. 45) lists only two Saturday classes—March 17 and April 14. The Respondent's payroll records indicate that Smith did not work on Saturday, March 17.

⁴² Smith said that Mike and Ben Spargo told him to come in on rainy days and wait around a couple of hours, and we would get 2 hours' show-up time.

⁴³ The climate reports in G.C. Exh. 13 indicate that it was rainy, misty and foggy on March 30. However, the Respondent's timesheets for March 30 indicate that Smith was out that entire day; no hours are recorded for him.

reason.⁴⁴ Smith said he had never been told that he was a problematic worker at the Company and even asked Spargo at the time of his discharge whether he had done something the Company disapproved of. According to Smith, Spargo simply said no and seemingly tried to avoid further discussion.

Smith stated that he had no discussions with Salbeck and the Keenes about organizing the project because they worked only a short time together on the same crew. Smith denied telling other coworkers that he was going to leave the Company after collecting information about it. He also denied telling anyone that Ben Spargo was going to make him some money.

Smith also denied that he tried to get himself terminated so that the Union could picket the site. According to Smith, his objective was to work and make a living; he received no benefits from the Union while working at Facchina.

Smith emphatically denied ever leaving the job early, saying he could not simply walk off the job without letting management know. Smith said that he did leave early on April 9 when he received a call that his house was on fire. Smith said he told Mike Spargo and Ours that he was leaving and the reason. Ours approved his leaving that day.

Alfred Keene testified that Mike Spargo told him that Saturday overtime was reserved only for his best workers, that a worker had to "prove" himself in order to get overtime, you had to be a hard worker. According to Alfred, he told Mike Spargo that on weekends he had to care for his two young children and childcare was difficult to secure on the weekends. Alfred said that he informed Mike of his situation when Mike asked if he were interested in working on Saturdays. Alfred said he worked only one Saturday—March 17—during his employment with Facchina.

Alfred recalled a conversation with Spargo on March 17 in which Spargo told him and his brother that he was letting four other carpenters go because of poor work, but that they (the Keenes) were doing such a good job. Spargo commended them and said he was looking to put together a good crew. According to Alfred, Spargo laid off the four allegedly deficient carpenters.

Alfred stated that the BWI project required carpenters to use electric saws and drills with motors exposed to the elements. Therefore, he would not work on rainy days in the absence of safety equipment. Alfred said he told Spargo early on that he would only work on "dry work," and that if Spargo did not have that kind of work on rainy days, he (and his brother) would not work that day. According to Alfred, Spargo seemed to understand.⁴⁵ Alfred conceded that some carpenters worked on rainy days.

⁴⁴ Smith was shown a copy of a State of Maryland Department of Labor form captioned "Notice of Benefit Determination" issued to Facchina indicating that the Company claimed that Smith was discharged for simple misconduct. Notably, the Office of Unemployment Insurance determined that Smith was discharged after being replaced by a more senior employee and that insufficient information had been presented by the Company to establish misconduct on his part. Smith said he had never seen this document but had been informed by the unemployment office that this was an issue with regard to his unemployment claim. Smith said that his performance or attendance was never raised by the unemployment office.

⁴⁵ Alfred said that he did not work on March 24, 30, 31, and April 4 and 9 because of rain. These were rainy days according to the climatological data in G.C. Exh. 13. Alfred said he worked on April 11, a rainy day, but only for a half-day. The climatological reports indicate that

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Alfred admitted that he did not work on March 23 because he accompanied his brother to traffic court. However, Alfred said he advised Mike Spargo of his intended absence beforehand and Spargo said he would schedule around them. Alfred said that any days he missed other than rainy days were cleared in similar fashion with Spargo. Even with respect to rainy days, Alfred claimed that he reported to work but, if the rain continued for around 30 minutes after his arrival, he would leave. According to Alfred, Facchina did not pay workers who showed up for work on rainy days, but who did not work.

Alfred said that he and his brother also left work early once when they were assigned work next to a portable john ("porta potty") and a swarm of bugs (gnats) made work impossible for him and his brother. Alfred and his brother complained to Mike Spargo and told him why they were leaving. Alfred noted that Spargo would not move the porta-potty. They also spoke to Ours on the way out and told him about the problem but that they would return to work the next day. Alfred said they suggested that the potty be emptied or moved. Ours indicated that he would. According to Alfred, this incident occurred on April 11 and he and his brother left work.

Alfred said that he was never told his work performance or his attendance was a problem by anyone in management.⁴⁶ Alfred recalled leaving work early during the first week of April on the occasion of his hammer being stolen while at work and preventing him from working.

Alfred said he and Lynwood did not work on Friday, April 13, because of Lynwood's divorce proceeding in local court. However, Alfred said that this information had been given to Mike Spargo about a week in advance. According to Alfred, Spargo did not object to his absence and said he appreciated the "heads up" and voiced no opposition to his request.

Alfred said that on April 16, he and Lynwood reported to BWI at around 7 a.m., but not to work. Alfred explained that he and Lynwood were under the impression they had been laid off as of April 13 because they had received word that Salbeck and Smith had been terminated.⁴⁷ Therefore, according to Alfred, he and Lynwood only came to the jobsite to pick up their final checks; they did not bring their tools. However, Alfred determined from the secretary that they had not been terminated. She instructed them to speak to Ours. According to Alfred, Lynwood spoke to Ours who confirmed that they were not terminated. Alfred said he told Ours they wanted to work that day but they had no tools; to go home and retrieve them would take a half-day; and it was also raining. Alfred stated they decided to go home and report for work the next day. According to Alfred, Ours gave his approval.

Alfred said he and Lynwood reported for work the next day, April 17, and, after passing out union literature, proceeded to work their assigned tasks.

this was a rainy day. The Respondent's records indicated Alfred worked 3 hours.

⁴⁶ Keene admitted that he signed the Company's rule of conduct form at the time of his hire, but said he was unaware of the call-in policy stated on the form. However, he said that as a matter of courtesy, he knew to call in if you were not coming in.

⁴⁷ Alfred stated that George Eisner of the Union left a message on April 13 informing them that Salbeck and Smith had been laid off and that they reported seeing extra checks, which they assumed were for the Keenes. Alfred said by the time they received the message around 4 to 4:30 p.m., the jobsite would be closed so they decided to pick up their checks on the following Monday, April 16.

Alfred said he and Lynwood reported for work on April 18 and were assigned work under the deck of the garage, mainly moving debris and stripping forms, laborers' work, not carpenters'.⁴⁸ After a time, according to Alfred, Mike Spargo came to the area and reassigned them to the top surface of the garage to build panels along with a father-son team. According to Alfred, he and Lynwood then began a conversation with the father and son team about the Company's preferences for building forms and how fast they wanted the work done. According to Alfred, Mike Spargo immediately came over and reassigned the father-son team to another area of the job.

Alfred stated that shortly after lunch, Spargo approached him and Lynwood and gave them their paychecks. According to Alfred, Spargo told them that he would have to let them go because another job was ending and more senior workers would be replacing them. Spargo, according to Alfred, said that he (and Lynwood) did fine work, good work; there was nothing wrong with their work. Spargo went so far as to say that they were probably some of the best guys he had. Spargo said that he had a bridge job coming up very soon and if they were looking for work, to give him a call; that he would be glad to hire them.⁴⁹ Spargo then said that he and Lynwood had to leave the site.

Lynwood Keene testified that on the first day on the job, once assigned to Mike Spargo's crew, Spargo informed him that the job was behind schedule because of language barriers on the existing crews. Spargo said he wanted to put together a good crew and that overtime opportunities would only be given to the best and most productive workers. According to Lynwood, Spargo told the assembled crew that job assignments, tools, attendance, and emergency matters should be directed to him.

Lynwood said that Saturdays were nonmandatory workdays, and he was never scheduled to work on Saturdays, although he and Alfred did work the first Saturday (March 17).⁵⁰

Lynwood stated that if he needed time off, he would call in as a courtesy to Spargo; but he usually informed Spargo in advance of his need to be off. Lynwood also stated that he always reported to work on rainy days but admitted that both he and his brother Alfred refused

⁴⁸ Alfred said the area where they were assigned the laborers' work was way out of sight—no one could see them. However, according to Alfred, a man whom he did not know but who was wearing a white hardhat told them that if they wanted things to get better, to take off the union apparel they were wearing; to stop pushing the union literature and things would be fine.

⁴⁹ Alfred stated that he did not follow through on Spargo's offer of employment and has not sought employment with Facchina since his discharge. Alfred said that Spargo gave him a telephone number to reach him if the Keenes wanted work. Alfred denied that the Union told him to try to get fired so that the Union could picket the Respondent. According to Alfred, the only instructions he received were what he heard Union Representative George Eisner telling his brother; that is, to have good attendance, work hard, do as he was told, and demonstrate that they were good carpenters.

⁵⁰ Lynwood said that his brother generally could not work Saturdays because of childcare problems. The Respondent's payroll records do indicate that Alfred worked that first Saturday. Alfred did not work any additional Saturdays after March 17. According to Lynwood, Spargo did not offer Saturday work to all crew members, only to certain ("select") persons.

to work with electrical tools in the rain out of concern for their personal safety. Lynwood said he informed Spargo or Ours on these occasions why he would or could not work.⁵¹

5 Lynwood confirmed that he did not work on March 23 because he was required to attend traffic court but that he cleared this with Spargo about 2 days earlier, as was his practice.

10 Lynwood acknowledged that he did not work on March 23, 24, 30, and 31 and April 7, 13, 14, and 16. Although he acknowledged that the Respondent's records indicate that he did not work on April 9, Lynwood thought that he did work that day. In any case, Lynwood noted that since he rode to work with his brother, in all likelihood, any days his brother was absent, he was also absent. Lynwood also conceded that he left work early on April 12 because of the bugs swarming around the porta-potty, and also on March 21 because he was required to attend a hearing preliminary to his divorce proceeding on March 25.

15 Regarding his not reporting for work on April 13, Lynwood stated that he was scheduled for his divorce proceeding and his brother was to serve as a witness. Lynwood said that he told Spargo the week before of this matter and that both he and his brother would be out. According to Lynwood, Spargo said there would be no problem but to remind him of the matter about a day before the scheduled court date.⁵²

20 Lynwood said that on April 16, he and his brother reported to work although it was raining. According to Lynwood, he spoke to the receptionist about the layoff of Smith and Salbeck the previous week and, thinking that he and Alfred had been discharged also, told her they were there to pick up their checks. According to Lynwood, the receptionist said she knew nothing of their being laid off and she had no final checks for them. Lynwood then spoke with Ours who confirmed that they had not been laid off. Lynwood said he told Ours that he and his brother were not quitting. Ours told them if they did not want to work in the rain, to come back the next day.

30 Lynwood said that he and Alfred reported for work the next day at around 6:30 a.m. and worked the entire day and (as noted earlier) distributed handbills before clocking in.

Lynwood said that on April 18, both he and his brother were discharged. He explained the circumstances leading to their termination.

35 On April 18, both he and his brother arrived at the site wearing their union decals, baseball cap, and union shirt. Spargo then assigned them work beneath the garage decking, picking up wood (called whalers).⁵³ According to Lynwood, this was not carpenters' work but they finished the assignment around 11 a.m. to noon. Spargo then assigned them to the top deck of the garage to do form work; this was an isolating work assignment according to

45 ⁵¹ Lynwood stated that the Respondent asked workers to report to work even if it were raining but the Company had no rainy day policy that provided for show-up pay if the weather prohibited work. Lynwood said that management allowed the workers' discretion to work in the rain. Laborers who did not use electrical tools could and did work in the rain.

⁵² Lynwood identified G.C. Exh. 46, a copy of a letter from his attorney dated March 12, 2001, advising of the April 13 court date.

50 ⁵³ Lynwood also stated that while he and his brother were working under the deck, a crane operator swung his bucket under the deck, a dangerous move in his view. He brought the matter to the attention of Spargo and Ours who investigated the incident. I inferred from his tone and demeanor on the stand that Lynwood viewed the incident as a threat.

Lynwood. After a time on the top deck, Spargo appeared and told him and Alfred they were being laid off and gave them their final checks. According to Lynwood, "Spargo said the layoff had nothing to do with our work, the Company was pleased with our work."⁵⁴ Spargo gave him a telephone number to call him if the hiring hall had no work.⁵⁵ Lynwood said that he tried to call Spargo that day or the next but was unable to contact him and never attempted to call him thereafter.

Regarding the four discriminatees' performance on the job, the General Counsel called George Eisner⁵⁶ and Coronado.

Eisner testified that as the Union's organizing director, he visits construction sites that may be hiring to encourage contractors to consider union carpenters for employment and possibly to work, negotiate signatory agreements, or use carpenters participating in the Union's apprenticeship program.

Eisner said that in April 2001,⁵⁷ he and Coronado paid a visit to the Facchina BWI project and arranged to speak with Ours about hiring his state-certified apprentices as a cost saving measure. After introducing himself to Ours, Eisner stated that he mentioned to him that he knew Facchina had hired several union carpenters, namely Smith, Salbeck, and the Keenes, and inquired if Ours were happy with them. According to Eisner, Ours said that he was. Eisner said that Ours also seemed receptive to Eisner's proposal to use the apprentices, but said he had to check with the main office before committing the Company. Ours, according to Eisner, asked him to call back in a couple of days, on April 13. Ours then gave him a business card on which Ours wrote the telephone number of the office trailer.⁵⁸ Eisner said he called Ours on April 13 and spoke to the secretary. Unable to reach Ours, Eisner left his name and number for Ours to return the call. Eisner said he called again on April 16, again leaving a message for Ours. Ours did not ever return his calls.

⁵⁴ Lynwood said that he had never received complaints about his work, that he, in fact, had been designated "worker of the week" on his second or third week on the job and his picture was posted in the office in acknowledgment of his work.

⁵⁵ Lynwood identified the envelope in which he received his last paycheck containing Mike Spargo's cell phone number. Lynwood said Spargo wrote the number down but not the word "Mike." See G.C. Exh. 47.

Spargo, it should be noted, denied (did not recall) telling the Keenes that some work was coming up and, if they were interested, to call him. Spargo also said that he did not recognize the telephone number on the envelope and that he did not have a cell phone. In any case, according to Spargo, the number was not in his handwriting.

⁵⁶ Eisner is the director of organizing for Carpenters Mid Atlantic Regional Council and served in that capacity during the period in question.

⁵⁷ Eisner said at the time he was wearing a Carpenters' Regional Council jacket with the carpenters' emblem affixed. Eisner noted that on the day he visited the BWI jobsite, employees were punching out early around 10 a.m. The Keenes credibly testified that April 11 was a rainy day and they and other workers left early. This fact is also established by the Respondent's records for April 11 (G.C. Exh. 28), which indicates most workers left early—around 9:30 a.m.—because of rain. The Keenes also met with Eisner in the parking lot later that morning. Therefore, while Eisner did not state the date of his meeting, it was clear that it was April 11, 2001.

⁵⁸ Eisner identified G. C. Exh. 59 as a copy of the business card given to him by Ours at this meeting.

William Coranado testified that he and Eisner visited the BWI site on April 11 and spoke with Ours. According to Coranado, Ours said that he knew the men Eisner had mentioned by name⁵⁹ as being some of his Eisner's union carpenters and they were doing a good job, were working very good, and he liked the way they worked. Eisner, according to Coranado, told Ours that the Union had more carpenters who would work equally well and that Facchina could save money by using some of the carpenter apprentices. According to Coranado, Ours responded favorably to Eisner's suggestion but said that he would have to check with the owner, Mr. Facchina, because the Company was looking for more workers in Baltimore. Ours gave Eisner a business card, and they left.

Coranado and Eisner happened upon the Keene brothers, Smith, and Salbeck at the site and met with the four in the parking lot. [As noted earlier herein, the Keenes attempted their first distribution of union literature on April 12.]

H. Discussion and Conclusions of the 8(a)(3) Allegations

Undoubtedly, an employer is entitled to discharge at will employees who, in its view, are inadequate performers either because of deficient skills and/or poor attendance. Employees also, under ordinary circumstances, can opt to keep certain employees it values or who have more seniority with the enterprise than other more recently hired workers. Trading on these estimable verities of the workplace, the Respondent argues that these admittedly "complex and multiple" but not shifting reasons were the basis of Ours' decision to terminate the four alleged discriminatees irrespective of their having engaged in activities supportive of the Union.

The General Counsel contends that the Respondent's defense is pretextual and not supported by the evidence. First, he asserts that the pretextual nature of the Respondent's defense is demonstrated by what he describes as the "shifting" reasons given for the terminations, citing the difference between the Respondent's position statement in which the Respondent claimed that Salbeck and Smith were let go solely because of poor attendance and the Keenes for poor attendance and the pending transfer of employees from another of the Respondent's jobs and the testimony of Ours which centered on the four's alleged poor attendance and performance. Second, the General Counsel submits that the credible record evidence does not support the Respondent's contention that the four were poorly performing workers at their trade. Furthermore, the days that the Respondent held them accountable for nonattendance were either excused absences, nonmandatory Saturdays, or rainy days. He contends that the Respondent's reliance on these absences demonstrates the pretext.

In general agreement with the General Counsel, I would find and conclude that the Respondent has not met its burden to establish that the terminations of Salbeck, Smith, and the Keenes were based on their individual poor performance and attendance and/or the Respondent's desire to preserve work for a more senior group of its employees. My reasons are as follows.

⁵⁹ Coranado recanted part of the sworn affidavit he provided to the Board agents in the investigation phase of this case, saying that he was mistaken when he averred in the affidavit that Eisner did not name the union members by name at BWI. To rehabilitate him, the General Counsel showed him a copy of a contractor contact report dated April 11, 2001, which Coranado said he contemporaneously prepared to memorialize the visit with Ours. The report indicates that Coranado wrote that Eisner told Ours the names of the union members working at BWI and that Ours said he was "happy" with them. (See G.C. Exh. 53.)

As I have stated, I found the four alleged discriminatees to be highly credible witnesses. To a man, they were confident and forthcoming in their testimony. They seemed to be conscientious workers and, being journeyman carpenters, I found it hard to believe they were not competent, not being able to cut a straight line as was claimed. Why would the Respondent hire such poor, incompetent workers and keep them on the job for as long as it did? Then, too, the four credibly testified that they were never given warnings or criticism (written or verbal) about their work or work habits. On the contrary, they were commended and invited to work overtime on Saturdays. I found Spargo's statement that he even asked poor workers to work overtime—someone being better than no, one as it were—simply incredible and making little business sense.

Crediting Eisner and Coranado, I also note that Ours, himself, told them that he was happy with the four as little as a day before he decided to let go Salbeck and Smith. Moreover, Ours, in a telephone interview with Maryland State Unemployment Official Soretha Staten on May 31, 2001, stated, "There was nothing wrong with Mr. Smith [sic] work and no other real problems to speak of."⁶⁰ All in all, I would find and conclude that the Respondent's defense that the four were poor performers is without merit, and pretextual.

I am in full agreement with the General Counsel regarding the four's alleged absenteeism in that the dates cited by the Respondent to establish a poor attendance record were either Saturdays, excused absences, or emergency or rain days for the four. Notably, Saturdays were purely voluntary workdays. Smith and the Keenes credibly testified that they could not work that day because of personal reasons, which they communicated to the Respondent. In likewise, it seems clear that the Respondent allowed its workers discretion to work on rain days; its records indicate that workers other than the four exercised that option not to work in the rain. The Keenes, in particular, were concerned about the safe operation of electric tools in the rain. It seems highly reasonable that they would not want to perform carpenters' work under wet conditions, and they communicated this to the Respondent who, as I believe, approved any early departures for this reason, as well as not working at all in rainy conditions.

It seems clear to me, based on the credible testimony, that each of the four alleged discriminatees did not simply leave the job without notice to at least Spargo. The Keenes said they left work on two occasions for cause—one time because of a stolen hammer, without which one of them could not work, and the other because of a bug infestation issue. In both cases, based on their credible testimony, the Respondent could or would not act to keep them on the job by either supplying a hammer on a temporary basis or perhaps moving the porta-potty or spraying insecticide.

Smith credibly said he left the job early once because of a fire at his home but told management of his need to leave. Therefore, to the extent leaving early reflects absenteeism or poor performance, it seems here that the four received permission to leave and their absences were excused. Accordingly, I would find and conclude that the Respondent's claim of excessive absenteeism as grounds for discharging the four was not supported by the credible evidence and was pretextual.

⁶⁰ Staten testified at the hearing, having been called by the General Counsel, and identified a fact-finding report on Smith's unemployment benefits claim. The quote above is taken from a telephone interview of Ours. See G.C. Exh. 72. I also note that Mike Spargo, when he told the four of their layoff, never mentioned poor work or attendance.

As to the Respondent's claim that it laid off the four to make room for the Clarendon crew that was more senior in the Respondent's operation, this, too, in my view, was merely a part of the pretextual discharge. As I have previously found, Spargo said that the union people would be laid off to make room for the new crew, which is discriminatory on its face and seriously undercuts the Respondent's argument that it was fairly replacing poor performers in favor of its more senior workers.⁶¹

The foregoing reasons in and of themselves, in my view, clearly support a finding of pretextual discharge. However, the last nail, as it were, is evidenced by the Respondent's having discharged the four within a short period of its discovery that there was an active organizing effort on the part of the Union at BWI. In this regard, it is notable that on April 11, Eisner told Ours that the four are his union members as he was pitching the Union to him. On April 12, the Keenes' attempt to distribute handbills. On April 12 (or 13), Salbeck and Smith are laid off. On April 17, the Keenes, with some opposition from Spargo, successfully distribute union handbills. On April 18, the Keenes are laid off. Given these circumstances, I find the Respondent's claim that it laid off the four union carpenters because they were poor workers, and to make room for another more senior crew, simply not persuasive. I would find and conclude, in agreement with the General Counsel, that the Respondent has not met its burden to prove that the layoff of the four was legitimate, and not based on improper motive. Accordingly, I would find and conclude that the four were wrongfully discharged—laid off—and will recommend an appropriate remedy.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating job applicants regarding their union membership, the Respondent violated Section 8(a)(1) of the Act.

4. By coercively telling employees that all union carpenters had to be laid off, the Respondent violated Section 8(a)(1) of the Act.

5. By coercively telling employees that they could not pass out union literature outside the front gate of the Respondent's BWI jobsite, the Respondent violated Section 8(a)(1) of the Act.

6. By laying off (discharging) William Salbeck, Lester Smith, Alfred Keene, and Lynwood Keene, the Respondent violated Section 8(a)(1) and (3) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent has not violated the Act in any other manner or respect.

⁶¹ I note that Smith and Salbeck were told union carpenters were being let go, and this explains why the Keenes thought they also had been laid off on April 12.

The Remedy

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily laid off (discharged) William Salbeck, Lester Smith, Alfred Keene, and Lynwood Keene, I shall recommend that it be ordered to offer them reinstatement and make them whole for any loss of earnings and other benefits they may have suffered by virtue of the discrimination practiced against them, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶²

ORDER

The Respondent, Facchina Construction Company, Inc., La Plata, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating job applicants regarding their union membership.

(b) Coercively telling employees that all union carpenters had to be laid off.

(c) Coercively telling employees they could not pass out union literature outside the front gate of the Respondent's BWI jobsite.

(d) Discharging or otherwise discriminating against any employee for supporting Carpenters Regional Council Baltimore and Vicinity a/w United Brotherhood of Carpenters and Joiners of America, or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Salbeck, Lester Smith, Alfred Keene, and Lynwood Keene full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

⁶² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make William Salbeck, Lester Smith, Alfred Keene, and Lynwood Keene whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

5 (c) Within 14 days from the date of this Order, remove from their files any reference to William Salbeck, Lester Smith, Alfred Keene, and Lynwood Keene's unlawful discharges and, within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

10 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this
15 Order.

(e) Within 14 days after service by the Region, post at its office in La Plata, Maryland, copies of the attached notice marked "Appendix."⁶³ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized
20 representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these
25 proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 31, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn
30 certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 13, 2003

35 

40 Earl E. Shamwell Jr.
Administrative Law Judge

45
50 ⁶³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT interrogate job applicants regarding their union membership.

WE WILL NOT coercively tell employees that all union carpenters have to be laid off.

WE WILL NOT coercively tell employees that they cannot pass out union literature outside the front gate of our BWI jobsite.

WE WILL NOT discharge or lay off employees because they have joined, supported, or assisted the Carpenters Regional Council Baltimore and Vicinity a/w United Brotherhood of Carpenters and Joiners of America, or any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer William Salbeck, Lester Smith, Alfred Keene, and Lynwood Keene full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make William Salbeck, Lester Smith, Alfred Keene, and Lynwood Keene whole for any loss of earnings and other benefits resulting from their discharges because of membership in and/or support of Carpenters Regional Council Baltimore and Vicinity a/w United Brotherhood of Carpenters and Joiners of America, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to William Salbeck, Lester Smith, Alfred Keene, and Lynwood Keene's unlawful discharges and, within 3 days thereafter, and WE WILL notify them in writing that this has been done and that their discharges will not be used against them in any way.

FACCHINA CONSTRUCTION COMPANY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor, Baltimore, MD 21202-4061

(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (410) 962-3113.

